Chicago-Kent Law Review

Volume 26 | Issue 4 Article 2

September 1948

Discussion of Recent Decisions

Chicago-Kent Law Review

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Recommended Citation

Chicago-Kent Law Review, *Discussion of Recent Decisions*, 26 Chi.-Kent L. Rev. 329 (1948).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol26/iss4/2

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CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price, $2.00 per year Single copies, 75c Foreign subscription, $2.50

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VOLUME 26 SEPTEMBER, 1948 NUMBER 4

DISCUSSION OF RECENT DECISIONS

ACTION—ACTIONS FOR DECLARATIONS OF RIGHTS *WITHOUT* OTHER RELIEF—RIGHT OF LESSEE, OBLIGATED BY LEASE TO PAY TAXES, TO OBTAIN DECLARATORY JUDGMENT AS TO VALIDITY OF TAX IMPOSED UPON THE DEMISED PREMISES—The recent Kansas case of *Boeing Airplane Company* v. *Board of County Commissioners of Sedgwick County*[1] was one calling for a declaratory judgment as to the validity of certain taxes assessed against leased premises. Plaintiff was the lessee of, and held an option

1 164 Kan. 149, 188 P. (2d) 429 (1947). Although Burch, J., wrote the opinion for the majority, he also wrote a dissenting opinion, concurred in by Wedell and Hoch, JJ.

to buy, the real property in question which was owned by the Reconstruction Finance Company as successor to the Defense Plant Corporation. By the terms of the lease, plaintiff was obligated to pay any taxes which were lawfully assessed against the demised premises. The defendants had entered the property in question upon their tax books for the years 1944 to 1946 as the property of the plaintiff, notwithstanding the fact that the legal title was in the Reconstruction Finance Company, apparently acting on the assumption that taxes were to be levied and collected in the same manner as on privately owned property. The lessee's protest against the assessment was denied both by the defendant and the state commission of revenue and taxation, despite the claim that the tax levy was invalid.[2] Plaintiff then sought a declaratory judgment as to the validity of the tax levy, impleading the Reconstruction Finance Company as a defendant.[3] The principal defendants demurred, claiming that the court had no jurisdiction on the ground that the petition did not disclose any controversy within the purview of the local declaratory judgment act[4] and also because there was no privity of interest between the lessee and the taxing authorities over the taxation of property belonging to another. The district court sustained jurisdiction but upheld the demurrer on the second ground. On appeal to the Supreme Court of Kansas, that court, with three judges dissenting, declared that the lower court was without jurisdiction to entertain a declaratory judgment proceeding of that character and ordered the appeal dismissed.

The instant case presents, for the first time in the United States, an inquiry as to whether a lessee, under an obligation to pay lawful taxes, could secure declaratory relief as to the validity of taxes assessed against real estate not owned by the lessee. The decision of the Kansas court to the effect that such a lessee may not, is unfortunate in two respects. It is contrary to the progressive attitude of declaratory judgment acts in general and to the Kansas statute in particular, as well as contrary to views expressed in ordinary law actions involving the same subject wherein a much more rigid attitude toward the problem could have been rationalized on a sounder basis.

In the first place, it is a well established legal principle that a lessee

2 The claim of invalidity was based on the argument that U. S. C. A., Tit. 15, § 610, permitting taxation of property belonging to the Reconstruction Finance Company, was in conflict with the act admitting Kansas into the Union, 12 Stat. 127, § 3, para. 6; with the joint resolution of the Kansas legislature accepting statehood, Kan. Laws 1862, Ch. 6; and also with Kan. Gen. Stat. 1937, § 79-201(5), exempting property owned, used by, and belonging exclusively to the United States government.

3 The Reconstruction Finance Company filed an answer which did no more than admit all the facts alleged in plaintiff's petition.

4 Kan. Gen. Stat. 1935, § 60-3127 et seq.

who agrees to pay all taxes levied on the demised premises thereby assumes only to pay such taxes as may be legal and valid. The leading case on that point is *Clark* v. *Coolidge*[5] which, ironically enough, was also decided in Kansas. Conversely, taxing bodies have, at times, availed themselves of such a contract between lessor and lessee to justify a levy of taxes directly against the lessee. In *New York Guaranty and Indemnity Company* v. *Tacoma Railway & Motor Company*,[6] for example, the court said: "We are of the opinion that the motor company's exclusive possession and enjoyment for the period of 25 years of the leased portion of the power plant site, with a covenant binding it to pay the taxes thereon 'fulfills the condition of being owner' for the purposes of taxation."[7] The conclusion is irresistible that if the lessee who assumes the payment of taxes is bound to pay only such taxes as are valid, and if he may be directly coerced into paying such taxes, he should, as a matter of natural justice, be permitted to enter a direct contest to determine the validity thereof.

This general proposition has, as a matter of fact, been subscribed to by the courts. In *Pursell* v. *Mayor, etc., of the City of New York*,[8] the lessee had paid an assessment for local improvements by reason of a covenant in his lease binding him to pay all such assessments. On application by his landlord, pending at the time payment was made, the assessment was set aside. It was held proper for the lessee to have the benefit of that decision and to recover the amount of the taxes so paid. There is considerable significance in the remark there made to the effect that ". . . the plaintiff was not the party assessed, nor was he the petitioner in the proceeding to vacate the assessment; but he had a valuable leasehold interest in the property, upon which the assessment was an apparent lien, and he was also bound by the covenants in his lease to pay all the assessments. He was, therefore, the real party in interest in the proceedings instituted by his landlord to vacate the assessment. He might have instituted them himself . . ."[9]

The case of *In re Burke*[10] possesses much the same effect for there the court said: "Nor, if a lessee is bound by his lease to pay an assess-

[5] 8 Kan. 189 (1871), cited in Tiffany, Landlord and Tenant (Callaghan & Co., Chicago, 1912), Vol. 1, § 143(3). To the same effect are the cases of Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624 (1900), Hart v. Town of Cornwall, 14 Conn. 228 (1841), and New York El. R. Co. v. Manhattan R. Co., 63 How. Pr. 14 (New York, 1881). See also Underhill, Law of Landlord and Tenant (T. H. Flood & Co., Chicago, 1909), Vol. 2, § 606.

[6] 93 F. 51 (1899).

[7] 93 F. 51 at 57.

[8] 85 N. Y. 330 (1881).

[9] 85 N. Y. 330 at 333.

[10] 62 N. Y. 224 (1875).

ment laid, can I perceive a difference between him and an owner, in his right to take this proceeding . . . Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made . . . The provision of law for this special proceeding to vacate was meant to afford an early, speedy and cheap mode of testing the legality. It is open to any one, owner or lessee, who is likely to be put to litigation and expense by reason of it."[11] The reactionary attitude of the majority of the court in the instant case is pointed up, and its incongruity heightened, by the sharp contrast with such liberal language expressed over seventy years ago.

Cognizance should also be taken of an additional factor, to-wit: the plaintiff was not only lessee but in addition had an option to buy the demised property involved in the instant case. A similar interest was held sufficient to warrant a declaratory judgment in *Ken Realty Company* v. *Johnson*,[12] wherein it was decided that an original complaint to enjoin the levying of an ad valorem tax against realty occupied by the plaintiff under a contract to purchase from the United States government contained a sufficient demand for judgment to include within its scope a declaration of right based upon such possessory interest. If it should be argued that such a right is only a contingent one, the argument must be countered with the assertion that in many instances "even if a right claimed is contingent upon the happening of some future event, its present determination may serve a very real practical need of the parties for guidance in their future conduct."[13] The Connecticut case of *Sigal* v. *Wise*,[14] says this very thing for it was there pointed out that a construction of declaratory judgment statutes which would "exclude from the field of their operation the determination of rights, powers, privileges and immunities which are contingent upon the happening or not happening of some future event would hamper their useful operation."[15]

The Kansas Declaratory Judgment Act, like similar statutes, is avowedly remedial and states that its purpose is "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered,

[11] 62 N. Y. 224 at 228.

[12] 46 F. Supp. 408 (1942).

[13] See annotation in 87 A. L. R. 1216 to Heller v. Shapiro, 208 Wis. 310, 242 N. W. 174, 87 A. L. R. 1201 (1932).

[14] 114 Conn. 297, 158 A. 891 (1932), noted in 41 Yale L. J. 1090.

[15] 114 Conn. 297 at 302, 158 A. 891 at 893.

with a view to making the courts more serviceable to the people."[16] It is futile to have a legislature subscribing to progressive principles of legal administration of that character if the courts will not translate legislative intent into practical reality. The declaratory judgment is a lusty infant of the law. It is fitting that its growth and development should be zealously guarded so as to insure as nearly perfect a specimen as possible when it comes of age. But it is quite another thing to positively retard its growth and development by decisions that will circumscribe its natural scope and attenuate its potential force.[17] The instant case stands as a refutation of the basic reasons which prompted the adoption of the declaratory judgment device. It is, therefore, not unreasonable to hope that the principles for which it stands will be rejected by subsequent decisions.

I. STEIN

CHARITIES—CREATION, EXISTENCE, AND VALIDITY—WHETHER OR NOT GIFT IN TRUST TO CLOISTERED CONVENT MEETS REQUIREMENT THAT TRUST FOR CHARITY MUST DISCLOSE PUBLIC BENEFIT TO BE VALID—The vexatious question of whether a gift in trust for the benefit of a cloistered convent amounts to a valid charitable gift was placed squarely before the Chancery Division of the High Court of Judicature in the English case of *In re Coats' Trusts*.[1] In that case, a sum of money was held by trustees under a declaration of trust with direction to apply the income for the purposes of a Roman Catholic cloistered convent but if such purposes were not charitable then the trustees were directed to apply the trust fund to another religious community whose purposes were admittedly charitable. Upon request by the trustees for directions, the evidence showed that the convent consisted of a group of twenty strictly cloistered and contemplative nuns who devoted their lives to self-sanctification within their convent and who engaged in no exterior corporeal works of mercy.

16 Kan. Gen. Stat. 1935, § 60-3127.

17 Perhaps the most adequate expression of the purpose and efficacy of the declaratory judgment proceeding was made by Edson R. Sunderland, "A Modern Revolution in Remedial Rights—The Declaratory Judgment," 16 Mich. L. Rev. 69 at 76 (1917), where he states: ". . . if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the parties. To ask the courts merely to say whether you have certain contract rights against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask for coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war; the former assumes that both parties wish to do right, the latter is based on an accusation of wrong . . . It makes the law suit a cooperative proceeding in which the court merely assists the parties to settle their differences by stating the rules of law which govern them."

1 Sub nom. Coats v. Cilmour, [1948] Ch. 1.

The way of life of these nuns, however, was said to be a source of great edification to other Catholics and indeed, in innumerable cases, to non-Catholics, leading them to a higher estimation of spiritual things and to a greater striving after their own spiritual perfection as well as to inculcate in such persons a greater estimation of the value and importance of the things which were eternal than they would have had if they had not these examples before them.[2] The court summed up the evidence as tending to indicate that the nuns in question, by means of their private worship, prayers, and meditations, caused the intervention of God to bring about "the spiritual improvement of the public (both Catholic and non-Catholic)" and also provided "an example of self-denial and concentration on the life of the spirit tending to the spiritual edification of . . . members of the public."[3] Despite such evidence and contrary to the contention of counsel for the convent, that in determining whether a particular religious purpose was for the benefit of the public the court should assume the tenets of the particular religion to be true, it was held that the purposes of the convent in question were not charitable, the benefit to the public being too incidental and indirect, hence the trust over was called into operation.

Ever since Lord Macnaghten's decision in the case of *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel*,[4] legally recognized charities have been classified into four broad categories, to-wit: "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."[5] Subsequent decisions have paid service to the proposition that for a gift in trust to be for a charity "there must be some public purpose—something tending to the benefit of the community."[6] The gift in the instant case failed on this very issue for the court, in reaching its decision, relied upon dicta in the case of *Cocks* v. *Manners*[7] to the effect that a gift to a cloistered convent could not be a charitable gift as it would be lacking in any aspect of public benefit.

The law relating to charities, however, has developed substantially during the past century and would hardly appear to support the decision

2 See affidavit by Cardinal Griffin, set out in [1948] Ch. 1 at p. 9.

3 [1948] Ch. 1 at p. 10.

4 [1891] App. Cas. 531.

5 Ibid., at p. 583.

6 See In re Foveaux, [1895] L. R. 2 Ch. 501 at p. 504. But for an interesting discussion of the proposition that a showing of public benefit should not be necessary as to gifts for the advancement of religion, see F. H. Newark, "Public Benefit and Religious Trusts," 69 Law Quart. Rev. 234 (1946).

7 [1871] L. R. 12 Eq. Cas. 573.

in the instant case. It is true that the English courts at one time held that bequests for the saying of masses for the repose of the soul of the deceased testator were to be deemed illegal since the gift tended to propagate a religion other than the one recognized by the state.[8] After the passage of the Roman Catholic Charities Act,[9] such gifts were still held invalid, but on the ground of being superstitious uses.[10] This last mentioned view was corrected in *Bourne* v. *Keane*,[11] but it was not until the decision in the case of *In re Caus*[12] that the court finally held that gifts of that character were charitable. The former decisions to the contrary were there declared to be based upon "insufficient and incorrect information with regard to the character of the rite,"[13] and upon the false assumption that, as the dominant purpose was to benefit the testator, the gift could not be charitable, egoism being the direct antithesis of charity. The court there received evidence as to the nature and purpose of the Mass,[14] accepted the teachings of the Roman Catholic Church to be a true exposition,[15] and arrived at the conclusion that as the gift was designed for the advancement of religion it bestowed a public benefit, hence was charitable in character. The courts of Ireland also, at one time, indicated that there was no public benefit which could be shown by legal evidence,[16] but that view was likewise expressly overruled in the case of *O'Hanlon* v. *Logue*.[17]

In this country, trusts for masses have generally been held to be charitable in character,[18] and, since gifts to charity are looked upon with favor, every presumption consistent with the language used will be

8 Cary v. Abbot, 7 Ves. Jun. 490, 32 Eng. Rep. 198 (1802).

9 2 and 3 Wm. IV, c. 115 (1832); Halsbury, Laws of England, Vol. IV, p. 132.

10 West v. Shuttleworth, 2 My. & K. 684, 39 Eng. Rep. 1106 (1835); Heath v. Chapman, 2 Drewry 417, 61 Eng. Rep. 781 (1854).

11 [1919] App. Cas. 815.

12 Sub. nom. Lindeboom v. Camille, [1934] Ch. 162.

13 Ibid., at p. 169.

14 The evidence indicated that every Mass, "on whatever occasion used, is offered to God in the name of the church, to propitiate His anger, to return thanks for His benefits, and to bring down His blessings upon the whole world." It was said to be impossible, according to the doctrine of the church, "that a Mass can be offered for the benefit of one or more individuals living or dead to the exclusion of the general objects included by the church." See In re Caus, [1934] Ch. 162 at p. 167.

15 On that score, the court said it would refuse "to entertain an inquiry as to the truth or soundness of any religious doctrine, provided it is not contrary to morals or contains nothing contrary to law." [1934] Ch. 162 at p. 168.

16 See Attorney-General v. Delaney, [1875] Ir. R. 10 C. L. 104.

17 [1906] 1 Ir. R. 247.

18 Sedgwick v. National Savings & Trust Co., 130 F. (2d) 440 (1942); Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527 (1898); Harrison v. Brophy, 59 Kan. 1, 51 P. 883 (1898); Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068 (1902); Webster v. Sughrow, 69 N. H. 380, 45 A. 139 (1898); Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305 (1888); Sherman v. Baker, 20 R. I. 446, 40 A. 11 (1898); In re Kavanaugh's Estate, 143 Wis. 90, 126 N. W. 672 (1910).

indulged in to sustain them.[19] It being a political as well as a legal principle that there shall be no established religion, and government being forbidden to participate in the support of or dissemination of religion of any kind, all religious societies in the United States must depend upon the eleemosynary contributions of individuals for their support. Whenever the end of such gifts is truly religious, the law ought not stand in the donor's way and should hold such donations as being really charitable.[20] The decision in the case of *In re Kavanaugh's Estate*[21] is typical, for it was stated therein, in reply to the contention that no public benefit was afforded by the saying of masses that according "to the doctrine of the Catholic Church as established by the proof in this case, the whole church profits by every mass . . . 'The individuals who participate in the fruits of this mass are the person or persons for whom the mass is offered, all those who assist at the mass, the celebrant himself, and for all mankind, within or without the fold of the church.' So it seems clear upon reason and authority . . . that a bequest for masses is a 'charitable bequest,' and valid as such, although the repose of the souls of particular persons be mentioned."[22]

According to the teaching of the Roman Catholic Church, the benefit from a gift for masses is two-fold; spiritual, by the infusing of grace into the soul of man, and material, by the Divine bounty bestowed upon mankind. Another benefit may be found in that the mere knowledge there will be a rendition of the Mass edifies a large group of persons, Catholics and non-Catholics alike, leading them to "a higher estimation of spiritual things and to a greater striving after their own spiritual perfection."[23] If this is so, it seems inconsistent for a court to hold that a gift to a cloistered convent is not charitable in character for the same type of benefit is conferred by the prayers of the devote nuns as results from the saying of the Mass. The court would seem to misconstrue the whole object and purpose of nuns such as those in the instant case, in devoting their lives to self-sanctification in strict seclusion, when it holds that such purposes are for the benefit of the nuns alone and not for any appreciable portion of the public. This view "postulate[s] egoism as the note of the monastic life."[24] It is most unlikely that the prayers of such nuns are directed only to the procurement of blessing for themselves, but in any event their godly lives set an example and edification to the whole Church, if not to the entire public.

19 Carlstrom v. Frackelton, 263 Ill. App. 250 (1931).

20 Powers v. First National Bank of Corsicana, 138 Tex. 604, 161 S. W. (2d) 273 (1942).

21 143 Wis. 90, 126 N. W. 672 (1910).

22 143 Wis. 90 at 98, 126 N. W. 672 at 675.

23 See In re Coats' Trusts, [1948] Ch. 1 at p. 9.

24 Maguire v. Attorney-General, [1943] Ir. R. 238 at 247.

Judges and lawyers cannot be expected to be theologians, nor is it desirable, in this age of acute differences as to religious beliefs, that they should be. But if there is to be no discrimination over religions, it would seem to be better policy to adhere to views such as those expressed in the Caus and Kavanaugh cases. Under those views, at least, courts will not be open to the charge that they favor one religion over another.

J. A. SACCONE, JR.

CONTRACTS—REQUISITES AND VALIDITY—VALIDITY OF PROVISION IN ORIGINAL AGREEMENT WHEREBY CONTRACTING PARTY STIPULATES TO WAIVE BENEFIT OF STATUTE OF LIMITATION—In the recent Massachusetts case of *National Bond & Investment Company* v. *Flaiger*,[1] the facts disclosed that the defendant purchased a car under a conditional sale contract in 1939 and at that time executed an installment promissory note to secure the unpaid balance. The note contained a provision to the effect that all "parties to this note . . . hereby severally waive . . . diligence in bringing suit against any party hereto," and further authorized the holder to accelerate payment in case of default. The car was subsequently repossessed and sold because of default in payment of an installment on the note and the sale price was applied to reduce the indebtedness, leaving a deficiency thereon. Suit was brought on the note in 1946, to recover this balance, to which action the defendant pleaded the statute of limitation.[2] The plaintiff replied that the statute could not be asserted as the defendant had waived the benefit of its terms, by the language above quoted, but the defendant contended that such waiver was against public policy and void. The trial court upheld the defendant's contention, the appellate court dismissed an appeal therefrom, and the Supreme Judicial Court of Massachusetts, on further appeal, also affirmed the judgment, holding for the first time in that state that agreements in original obligations never to set up the statute of limitations violate the public policy underlying the statute.

While it is generally held that parties cannot, by agreement, modify a law, there is also unanimity of opinion on the point that they may forego the protection afforded by a particular law provided no principle of public policy is thereby violated.[3] It is obvious, therefore, that the public policy permeating statutes of the kind in question must be clearly

1 — Mass. —, 77 N. E. (2d) 772 (1948).

2 Mass. G. L. (Ter. Ed.), Ch. 260, § 2, limits actions to six years after the whole indebtedness becomes payable. It was applicable to the instant case, as the note in question had been declared due early in 1940 by acceleration when default occurred.

3 Wells Fargo v. Enright, 127 Cal. 669, 60 P. 439 (1900); Quick v. Corlies, 39 N. J. L. 11 (1876).

outlined before it is possible to pass on the validity of agreements such as the one involved in the instant case. Jurists generally consider such statutes as designed to serve both the needs of individuals and the courts; affording repose to individuals by preventing fraud and perjury against defendants handicapped by time-worn memories, paucity of witnesses, and loss of evidence which might once have existed, while protecting courts against the sudden descent of a mass of stale claims, thereby insuring a continuous flow of cases permitting of orderly, careful, and just determination. There is, however, another factor to be considered and that is the well-accepted fact that needy men are not essentially free men, hence will yield to pressure and assent to contractual terms, no matter how oppressive and unjust, in order that urgent needs may be satisfied.[4]

Although the language used in many decisions would seemingly appear to present a great conflict, if the foregoing criteria are observed, the cases can be placed in definite categories. In the first group, adequately represented by the facts of the case under discussion, are cases where the waiver is attempted at the inception of the original obligation, *i.e.* at the time when the need of the debtor can best be exploited by the creditor. According to the prevailing view, such a waiver will be deemed contrary to public policy,[5] as is also the case where a renewal is granted only on condition that the maker forego the protection of the statute.[6]

In contrast thereto, a second group of cases display a willingness to declare a waiver of the statute valid on the theory that as the parties may agree to a shorter period of limitation, less than that prescribed by statute,[7] they may fix a longer term so long as they deal at arms length

[4] Gorowitz v. Blumenstein, 184 Misc. 111, 33 N. Y. S. (2d) 179 (1944).

[5] Forbach v. Steinfeld, 34 Ariz. 519, 273 P. 66 (1928); Kentucky Coal & Feed Co. v. McConkey, 271 Ky. 261, 111 S. W. (2d) 418 (1938); U. S. Fidelity & Guaranty Co. v. Tafel Electric Co., 262 Ky. 792, 91 S. W. (2d) 42 (1935); Bates v. Lockley, 241 Ky. 498, 44 S. W. (2d) 589 (1932); Wright v. Gardner, 98 Ky. 454, 33 S. W. 622 (1895); Continental Bank & Trust Co. v. Simmons, 177 So. 384 (La. Civ. App., 1937); Pine v. Okoniewski, 256 App. Div. 519, 11 N. Y. S. (2d) 13 (1939); Mutual Life Ins. Co. v. U. S. Hotel Co., 82 Misc. 632, 144 N. Y. S. 476 (1913); Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548 (1870); Simpson v. McDonald, 142 Tex. 444, 179 S. W. (2d) 239 (1944); Young v. Sorenson & Hooper, 154 S. W. 676 (Tex. Civ. App., 1913); Nunn v. Edminston, 9 Tex. Civ. App. 562, 29 S. W. 1115 (1895). But see contra: Dexter v. Pierson, 214 Cal. 247, 4 P. (2d) 932 (1931); Atlas Finance Corp. v. Kenny, 68 Cal. App. (2d) 504, 157 P. (2d) 401 (1945). Waiver was limited to a definite or a reasonable time in Lyndon Savings Bank v. International Co., 78 Vt. 169, 62 A. 50 (1906), but was permitted, in State Trust Co. v. Sheldon, 68 Vt. 259, 35 A. 177 (1896), to extend forever.

[6] Steinfeld v. Marteny, 40 Ariz. 116, 10 P. (2d) 367 (1932). It would seem that the coercion is as great, at that moment, as it would be when the original loan was made.

[7] Agreements shortening the period have been upheld in Burliew v. Fidelity & Casualty Co., 276 Ky. 132, 122 S. W. (2d) 990 (1938); Lewis v. Metropolitan Life Ins. Co., 190 Mass. 317, 62 N. E. 369 (1902); Stewart v. National Council of Knights

and the period fixed is not unreasonable. Especially is this the case if the waiver agreement is entered into subsequent to the execution of the original obligation, provided attention is given to the qualification that the agreement defers the defense for a definite or reasonable time.[8] There are cases where the courts have decided that the defense of limitation is unavailable for so long as the parties may have agreed or, if the contract is indefinite as to time, then forever.[9] Most courts, however, will place a time limit beyond which the waiver will not be effective, either on the theory that the statute runs against the contract not to plead the statute,[10] or suspends the bar for a reasonable time which is measured by the statute,[11] or else on the ground that the contract operates only as a waiver of time already past.[12]

No Illinois reviewing court has, as yet, been called upon to decide the point raised in the case under discussion, nor has the question of the validity of a waiver subsequent to the original obligation been posed.[13]

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and Ladies, 125 Minn. 512, 147 N. W. 651 (1914); Asel v. Order of United Commercial Travelers, 355 Mo. 658, 193 S. W. (2d) 74 (1946); Appel v. Metropolitan Life Ins. Co., 159 Misc. 118, 286 N. Y. S. 424 (1935).

8 U. S. v. Curtis Aeroplane Co., 144 F. (2d) 639 (1945); Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714 (1925); Jones v. Davis, 65 Cal. App. 164, 223 P. 560 (1924); Kemper v. Industrial Accident Commission, 177 Cal. 618, 171 P. 426 (1918); State Loan Co. v. Cochran, 130 Cal. 245, 62 P. 466 (1900); Wells Fargo v. Enright, 127 Cal. 669, 60 P. 439 (1900); First National Bank v. Mock, 70 Colo. 517, 203 P. 272 (1921); Kellog v. Dickinson, 147 Mass. 432, 18 N. E. 223 (1888); Trask v. Weeks, 81 Me. 325, 17 A. 162 (1889); Maddux v. Jones, 51 Miss. 531 (1875); Crane v. French, 38 Miss. 503 (1860); Weir v. Silver Bow County, 113 Mont. 237, 124 P. (2d) 1003 (1942); Parchen v. Chessman, 49 Mont. 326, 146 P. 469 (1914); Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 (1896); Crocker v. Ireland, 235 App. Div. 760, 256 N. Y. S. 638 (1932); Watertown National Bank v. Bagley, 134 App. Div. 831, 119 N. Y. S. 592 (1909); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897); Dickson v. Slater Steel Co., 138 Okla. 234, 280 P. 517 (1929); McIntosh v. Condron, 20 Pa. Super. 118 (1902); Moore v. Taylor, 2 Tenn. Ch. App. 556 (1897); Jordan v. Jordan, 85 Tenn. 561, 3 S. W. 896 (1887). But see contra: Warren v. Walker, 23 Me. 453 (1884); Quick v. Corlies, 39 N. J. L. 11 (1876); Noyes v. Hall, 28 Vt. (2 Williams) 645 (1856).

9 Warren v. Walker, 23 Me. 453 (1884); Quick v. Corlies, 39 N. J. L. 11 (1876); Lyndon Savings Bank v. International Co., 78 Vt. 169, 62 A. 50 (1906); State Trust Co. v. Sheldon, 68 Vt. 259, 35 A. 177 (1896); Noyes v. Hall, 28 Vt. 645 (1856).

10 Cameron v. Cameron, 95 Ala. 344, 10 So. 506 (1891); Atlas Finance Corp. v. Kenny, 68 Cal. App. (2d) 504, 157 P. (2d) 401 (1945); Trask v. Weeks, 81 Me. 325, 17 A. 162 (1889); Crane v. French, 38 Miss. 503 (1860); Parchen v. Chessman, 49 Mont. 326, 146 P. 469 (1914); Newell v. Clark, 73 N. H. 289, 61 A. 555 (1905); Watertown National Bank v. Bagley, 134 App. Div. 831, 119 N. Y. S. 592 (1909).

11 First National Bank v. Mock, 70 Colo. 517, 203 P. 272 (1921); Bowman v. Paine, 64 Miss. 99, 8 So. 166 (1886); Maddux v. Jones, 51 Miss. 531 (1875); Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 (1896); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897); McIntosh v. Condron, 20 Pa. Super. 118 (1902).

12 Kellog v. Dickinson, 147 Mass. 432, 18 N. E. 223 (1888); Moore v. Taylor, 2 Tenn. Ch. App. 556 (1897).

13 Closest to the point is the case of Conerty v. Richsteig, 379 Ill. 360, 41 N. E. (2d) 476 (1942), reversing 308 Ill. App. 321, 31 N. E. (2d) 351 (1941). There the agreement to remain liable on the original debt, evidenced by a note, either accord-

There is language in the case of *Steen* v. *Modern Woodmen of America*[14] which might foreshadow an eventual holding in this state as it pertains to a waiver contained in the original obligation. The court there, when deciding the validity of a waiver of a law other than the statute of limitations, indicated that there should be the utmost liberty of contracting so that, when such contracts have been entered into fairly and voluntarily, they should be sustained. It has also been held, in this state, that an agreement limiting the time within which suit may be brought is valid if the period fixed is not an unreasonable one.[15] These decisions might indicate that an original waiver of the statute of limitations would be sound, on the theory that if its operation can be shortened by agreement it can also be extended. But sight should not be lost of the fact that waiver agreements are usually not truly voluntary ones, and this point may be seized upon as the determining factor should the problem ever arise in this state.

H. J. JENNINGS

CRIMINAL LAW—SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS—WHETHER OR NOT BURDEN OF PROOF NECESSARY TO ESTABLISH PRIOR CONVICTION IS SATISFIED BY INTRODUCTION OF AUTHENTICATED RECORD DISCLOSING SIMILARITY OF NAME—Surprisingly enough, the Illinois Supreme Court was never in a position to construe the degree of proof required by Section 2 of the Habitual Criminal Act[1] until the recent case of *People* v. *Casey*[2] afforded that opportunity. The defendant therein, one Patrick Leo Casey, was tried and convicted on an indictment which charged grand larceny and, in addition, two prior convictions for felony in Kansas and Missouri so as to bring the case within the Habitual Criminal Act.[3] At the trial, over objection by the defendant, the state offered authenticated copies of the records of the prior convictions referring to persons named Patrick Leo Casey and Patrick L. Casey respec-

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ing to its terms or "according to any agreement extending time of payment," was set forth in an accompanying real estate mortgage. Liability beyond the original period of limitation *on the note* was denied as the two documents were regarded as *separate* undertakings. Had the quoted language been found in the note, the instant problem would then have been squarely presented.

14 296 Ill. 104, 129 N. E. 546 (1920).

15 Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 382 (1861).

1 Ill. Rev. Stat. 1947, Ch. 38, § 603.

2 399 Ill. 374, 77 N. E. (2d) 812 (1948).

3 Ill. Rev. Stat. 1947, Ch. 38, § 602. No objection was made to the fact that the prior convictions arose out of the state, probably because of the decision in People v. Poppe, 394 Ill. 216, 68 N. E. (2d) 254 (1946). But see criticism thereof in 25 CHICAGO-KENT LAW REVIEW 157.

tively, but made no attempt to identify the accused as the person referred to in those records. On the strength thereof, and in the absence of any contradictory testimony offered by defendant, the jury decided that Casey was a habitual criminal. On writ of error obtained by defendant,[4] the Supreme Court reversed and remanded the case for a new trial on the ground that, in view of the imminence of an enhanced penalty such as is imposed on habitual criminals, it was not improper to require the state to establish the prior convictions by the same degree of proof demanded for the substantive offense, to-wit: proof beyond a reasonable doubt. It likewise held that the presumption of innocence runs as well to the allegation of prior conviction and is not overcome by authenticated records, even though declared to be prima facie proof by statute, without some additional evidence bearing on the question of identity.[5]

At least twenty-three American jurisdictions have considered this problem under habitual criminal statutes containing provisions similar to Section 2 of the Illinois act. When the Illinois Supreme Court was confronted with the problem, therefore, it had a choice of two well-seasoned views. Thirteen of these states apply the rule adopted in the instant case,[6] but there is a substantial minority where a verdict of guilty based only upon the prior record plus the presumption of identity arising from similarity of name will suffice.[7] Judicial harmony on the point is disrupted not because of any disagreement as to the degree of proof

[4] Ill. Rev. Stat. 1947, Ch. 38, §§ 771 and 780½.

[5] The fact that similarity of name may raise a presumption of identity of person in civil cases, Clifford v. Pioneer Fire-Proofing Co., 232 Ill. 150, 83 N. E. 448 (1908), and Filkins v. O'Sullivan, 79 Ill. 524 (1875), was declared insufficient to rebut the presumption of innocence in criminal cases: 399 Ill. 374 at 380, 77 N. E. (2d) 812 at 816.

[6] Thompson v. State, 66 Fla. 206, 63 So. 423 (1913); Kelley v. State, 204 Ind. 612, 185 N. E. 453 (1933); State v. Lowe, 235 Iowa 274, 16 N. W. (2d) 226 (1944); State v. Dugas, 170 La. 5, 127 So. 345 (1930); State v. Beaudoin, 131 Me. 31, 158 A. 863, 85 A. L. R. 1101 (1932); State v. Livermore, 59 Mont. 362, 196 P. 977 (1921); Burnham v. State, 127 Neb. 370, 255 N. W. 48 (1934); State v. Adams, 64 N. H. 440, 13 A. 785 (1888); People v. Krumme, 161 Misc. 278, 292 N. Y. S. 657 (1936); Angus v. State, 136 Tex. Crim. App. 159, 124 S. W. (2d) 349 (1939); State v. Bruno, 69 Utah 444, 256 P. 109 (1927); State v. Harkness, 1 Wash. (2d) 530, 96 P. (2d) 460 (1939); Green Bay Fish Co. v. State, 186 Wis. 330, 202 N. W. 667 (1925). Note: only the most recent decision from each jurisdiction is given in this and the succeeding footnote to avoid unnecessary repetition.

[7] People v. Williams, 125 Cal. App. 387, 13 P. (2d) 841 (1932); Stinson v. State, 65 Ga. App. 592, 16 S. E. (2d) 111 (1941); State v. Colopy, 120 Kan. 220, 242 P. 1016 (1926); Davis v. Commonwealth, 230 Ky. 732, 20 S. W. (2d) 731 (1929); State v. West, 175 Minn. 516, 221 N. W. 903 (1928); McGowan v. State, 200 Miss. 270, 26 So. (2d) 70 (1946); State v. Kimbrough, 350 Mo. 609, 166 S. W. (2d) 1077 (1943); Pitzer v. State, 69 Okla. Crim. App. 363, 103 P. (2d) 109 (1940); Tipton v. State, 160 Tenn. 664, 28 S. W. (2d) 635 (1930); Hefferman v. United States, 50 F. (2d) 554 (1931).

required,[8] but because the courts differ as to what constitutes proof beyond a reasonable doubt in such cases.

The language of the Iowa Supreme Court in the case of *State* v. *Smith*[9] contains an excellent statement of one view, for the court there said: "The statute provides for the introduction of authenticated copies of the judgments alleged in proof prima facie thereof. But the state may not stop there. The identity of the defendant as the person who suffered such former convictions remains to be proven. We grant that the identity of names may be some evidence of identity of persons; but standing alone, it is not enough. Every fact essential to the infliction of legal punishment upon a human being must be proven beyond a reasonable doubt. And it would amount to a travesty to say that a *prima facie* case for an increased term of punishment could be made out . . . by showing the isolated fact that a man passing under that name had at sometime or other been convicted [elsewhere] . . . The matter for the jury to determine is the historical fact involved in the charge, and this they must determine as any other fact in the case."[10] No such rhetoric is disclosed in cases expressing the opposite view, but an excerpt from the California case of *People* v. *Williams*[11] may be regarded as typical. The court there noted that "the name of the defendant who was convicted in Yuba county is identical with that of the defendant in this action. It is a rule of law that identity of person may be presumed from identity of name . . . also that a presumption constitutes a species of evidence which, unless controverted, is sufficient proof of the existence of the fact to which it relates."[12] The sharp contrast between the two views thus illustrated is irreconcilable.

Most courts following the reasoning illustrated by the Williams case impose on the defendant the burden of rebutting the presumption with evidence. Thus, the Oklahoma court in *Files* v. *State*[13] summarily affirmed the conviction of a defendant who refused to assume that burden. A more conservative element of the minority, however, looks rather to the strength of the presumption created as measured in terms of the surrounding circumstances. In *State* v. *Bizer*,[14] for example, the

[8] See annotation in 79 A. L. R. 1337, to the case of People v. Reese, 258 N. Y. 89, 179 N. E. 305 (1932), to the effect that it is universally regarded that the fact of the prior conviction is a substantive element of the offence charged and must be proved beyond a reasonable doubt just as is the case of any other element of the crime.

[9] 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539 (1906).

[10] 129 Iowa 709 at 714, 106 N. W. 187 at 189.

[11] 125 Cal. App. 387, 13 P. (2d) 841 (1932).

[12] 125 Cal. App. 387 at 388, 13 P. (2d) 841 at 842.

[13] 16 Okla. Crim. 363, 182 P. 911 (1919).

[14] 113 Kan. 731, 216 P. 303 (1923).

Supreme Court of Kansas suggested that the certified copy of the record placed before the jury would inform them of such facts as the nature of the prior offense, the manner by which it was accomplished, and the time and place of commission. Where these compare substantially, the existing presumption of identity would be sufficiently strong to warrant the jury finding, beyond a reasonable doubt, that the accused was the person named in the record. Similarly, in *Hefferman* v. *United States*,[15] the authenticated records showed that a person of the same name had been convicted several times for running a "speakeasy" in the same town and at the same address as that charged in the instant indictment. The Utah court, in *State* v. *Aime*,[16] considered the presumption strong enough where the name was not a common one, and there was nothing to indicate that more than one person in the vicinity was known by the same name.[17] But subsequent cases in the same jurisdictions would seem to reveal that this conservative view is difficult to apply and is apt to produce a swing in either direction.[18]

To say the least, there is logic behind the majority view for, if it be conceded that the state has the burden of proving the prior conviction beyond a reasonable doubt, then it follows as a necessary consequence that the presumption of innocence which favors the accused should require more than a mere presumption to offset it.[19] Certainly that burden would hardly be discharged by a presumption of fact which, on its face, is weaker than the legal presumption of innocence. But apart from logical consistency, the minority view is weak in the practical sense for, in a jurisdiction where the volume of criminal cases is substantial, a duplication of names is apt to occur frequently so that any identity of name becomes little more than a mere coincidence, but a coincidence which might weigh heavily against a defendant such as the one in the instant case.

This alone should be reason enough to put a well-defined burden on the prosecution, yet not serve to create an insuperable burden for, in most instances, proving the identity of a person is neither difficult nor expensive. It may be established by the testimony of witnesses who have

[15] 50 F. (2d) 554 (1931).

[16] 62 Utah 476, 220 P. 704 (1923).

[17] See also Belcher v. Commonwealth, 216 Ky. 12, 287 S. W. 550 (1926).

[18] In State v. Colopy, 120 Kan. 220, 242 P. 1016 (1926), for example, a conviction resting primarily on identity of name was affirmed. The later Utah case of State v. Bruno, 69 Utah 444, 256 P. 109 (1927), on the other hand, produced such a retreat from the rule in the Aime case, cited in note 16, ante, as to amount to a practical reversal thereof.

[19] Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 138 (1910); Agnew v. United States, 165 U. S. 36, 17 S. Ct. 225, 41 L. Ed. 624 (1897). See also Wigmore, Evidence, 2d Ed., Vol. V, § 2511.

known the accused;[20] by the sheriff who took him into custody after the prior conviction;[21] by the accused's own admission;[22] by the clerk of the court who read the prior sentence;[23] by photographs;[24] or by finger prints.[25] Such being the case, the Illinois Supreme Court is to be commended for achieving a rule which is eminently fair to all concerned.

D. V. O'BRIEN

DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY—WHETHER OF NOT INCREASE OF ALIMONY MAY BE JUSTIFIED ON GROUND DIVORCED HUSBAND HAS ACQUIRED ADDITIONAL WEALTH SUBSEQUENT TO DECREE—A problem of first impression, presented to the Appellate Court of the First District in the recent case of *Arnold* v. *Arnold*,[1] required that court to decide whether or not a divorced wife was entitled to an increase in alimony upon a showing that her divorced husband had increased his wealth many times since the date of the original decree. The plaintiff therein had obtained an absolute divorce in 1931 together with an allowance of periodic alimony. Fourteen years later, she petitioned for an increase of the alimony alleging that while, at the time of the divorce, the defendant had been employed at a salary of seventy-five hundred dollars a year, he had since made over a million dollars and would probably receive an income of seventy thousand dollars for the following year. The master in chancery, after conducting hearings on the petition, recommended a substantial increase in the alimony allowance but the chancellor granted only a moderate increase on grounds other than those relating to defendant's newly-acquired affluence. Both parties appealed from the modification of the decree. The Appellate Court, however, affirmed the holding on the ground that as plaintiff had contributed nothing to defendant's acquisition of wealth, and had procured an absolute divorce, she was entitled to only such alimony as was sufficient to maintain her in the station of life to which she had become accustomed at the time of the divorce, with an increase therein sufficient to meet the present high cost of living[2] and changes produced by the

[20] State v. Howard, 30 Mont. 518, 77 P. 50 (1904); State v. Wilmot, 95 Wash. 326, 163 P. 742 (1917).

[21] State v. Garrish, — Mo. —, 29 S. W. (2d) 71 (1930).

[22] State v. Rusnak, 108 N. J. L. 84, 154 A. 754 (1931).

[23] Klein v. United States, 14 F. (2d) 35 (1926).

[24] State v. Smith, 128 Ore. 515, 273 P. 323 (1929).

[25] People v. Reese, 258 N. Y. 89, 179 N. E. 305, 79 A. L. R. 1329 (1932).

[1] 332 Ill. App. 586, 76 N. E. (2d) 335 (1947).

[2] Gehlbach v. Gehlbach, 219 Ill. App. 503 (1920); Brown v. Brown, 209 Mo. App. 416, 239 S. W. 1093 (1922).

amendment of the federal income tax law redistributing the burden of taxation on alimony payments.[3]

While the Illinois legislature has seen fit to provide for modification of alimony allowances, at least as to those payable periodically, it has not specified what new facts will warrant an alteration of the original sum fixed by the court.[4] By allowing the trial court to exercise broad discretionary powers the legislature has left judicial hands untied and capable of dealing equitably with the varied problems which may arise. There is indication that when so dealing the court should not act "in a niggardly manner"[5] but that is far from saying there are no observable limits on the court's power.

The instant question whether or not to increase the alimony on the basis of the ex-husband's new wealth, is certainly novel, for Illinois courts have not previously had occasion to deal therewith directly, but from what has been said in other Illinois cases it is clear that a change of circumstance is required.[6] The phrase "change in circumstance" has meaning for, unless it be shown, the court will not have jurisdiction to modify the decree.[7] Two elements appear to be essential, to-wit: need on the part of the ex-wife, and ability on the part of the ex-husband to pay,[8] although there is dictum to the effect that a change in either element may be enough.[9] As applied to the instant case, only the second factor was shown to be present, in the form of a greatly enhanced ability to pay more alimony, thereby leading to the direct problem as to whether or not that was enough to justify a modification of the decree.

Not only was the court without Illinois precedents to guide it, but apparently the problem has been rarely raised elsewhere. There are

3 Jacobs v. Jacobs, 328 Ill. App. 133, 65 N. E. (2d) 588 (1946). But see Russell v. Russell, 142 F. (2d) 753 (1944), where an increase was denied on the ground that to grant the same would merely be readjusting the tax burden in a way not intended by Congress. The court did say, however, that an increase would be proper if the wife's station in life was lowered and the divorced husband was shown to be able to pay more.

4 Ill. Rev. Stat. 1947, Ch. 19, § 18, states: ". . . And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper." Similar statutes exist in other jurisdictions: Vernier, American Family Laws, Vol. II, § 106, and Supp. §§ 105-6.

5 Arnold v. Arnold, 332 Ill. App. 586 at 599, 76 N. E. (2d) 335 at 340.

6 Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925).

7 Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811 (1892).

8 Smith v. Smith, 334 Ill. 370, 166 N. E. 85 (1929); Cahill v. Cahill, 316 Ill. App. 324, 45 N. E. (2d) 69 (1942).

9 Herrick v. Herrick, 319 Ill. 146, 149 N. E. 820 (1925). See also Lay v. Lay, 204 Ill. App. 511 (1917), where the court expressed no uncertainty as to its power to grant an increase where the petitioner was the aggrieved party, but the petitioner there merely sought the additional sum to permit her to maintain the station in life she had occupied prior to the divorce.

some cases, however, which treat with the matter. In one case brought to the attention of the court, that of *Humbird* v. *Humbird*,[10] there is language tending to support the position claimed for the plaintiff, for the court talked of maintaining the wife in the style and condition that her ex-husband's financial position would have "justified her in maintaining but for his wrongful conduct."[11] But the basis for upholding the increase in alimony granted in that case was not that the ex-wife was entitled to share in her former spouse's subsequent good fortune so much as it was that the original allowance was set too low because based on the temporary condition of the ex-husband's income while in military service at the time rather than on his normal earning capacity as a civilian. Attention might have been directed, however, to the Minnesota case of *Erickson* v. *Erickson*[12] wherein the court, after originally fixing a lump-sum allowance, granted an additional permanent allowance upon a showing that the ex-husband had become a beneficiary of a trust whereby his income would become appreciably augmented.[13] While an Iowa court indicated that only the most unusual circumstances would ever cause it to order an increase,[14] one sitting in New Jersey allowed a generous increase after a consideration of the husband's intelligence, education, refinement, and experience.[15] In still another case, arising in New York, additional sums were allowed although the ex-husband was not employed in any gainful occupation and the value of his securities had fallen,[16] but the rationale thereof proceeded on the theory that as a reduction may be granted because of inability to make the payments, then conversely a subsequent increase is in order if the financial situation warrants it.[17] As none of these cases is strictly in point with the instant one, resort must be had to fundamental principles.

Alimony was originally developed in the ecclesiastical courts for the support of a woman after a divorce *a mensa et thoro* was granted,[18] a situation presently akin to the separate maintenance allowance authorized

10 42 Ida. 29, 243 P. 827 (1926).

11 42 Ida. 29 at 38, 243 P. 827 at 829.

12 181 Minn. 421, 232 N. W. 793 (1930).

13 There is irony in the fact that the court had to subsequently reduce the alimony because of decreased returns from the trust fund during the depression: Erickson v. Erickson, 194 Minn. 634, 261 N. W. 397 (1935).

14 See Handsaker v. Handsaker, 223 Iowa 462, 272 N. W. 609 (1937).

15 Farlee v. Farlee, 101 N. J. Eq. 111, 137 A. 648 (1927).

16 Faye v. Faye, 131 Misc. 388, 226 N. Y. S. 729 (1928).

17 See Weiner v. Weiner, 242 App. Div. 847, 275 N. Y. S. 177 (1934). A court may balk against granting a reduction, however, if it feels the ex-husband, during his lush days, failed to be prudent and to provide against lean times: David v. David, 146 Misc. 444, 261 N. Y. S. 456 (1932).

18 1 Bl. Comm. 441.

by statute when cause for living apart is found to exist.[19] In all probability, at inception, the courts were generous in fixing or modifying the amount of that allowance because the wife had no choice other than a separation and few women were afforded economic opportunities to permit of self-support. After such a decree, of course, the parties still remained husband and wife, so it was not regarded as improper to permit her to benefit from any subsequent increase in her husband's wealth through a suitable order increasing the alimony allowance.[20]

In the modern period, however, absolute divorce is available to all who possess adequate grounds,[21] and economic conditions have changed to the point where gainful occupation is open to all women except, perhaps, those burdened with the care of young children.[22] As the basic reasons for alimony have substantially disappeared, a person who elects to secure an absolute divorce should generally be entitled only to nominal damages for breach of the marriage contract,[23] except in cases where the age or condition of the health of the aggrieved party might call for more.[24] The one applying for an absolute divorce desires to reacquire rights relinquished at the time of marriage. Such a person ought, in turn, surrender rights gained by that marriage. Alimony ought not be treated as a punishment, but as an attempt to meet an economic problem. If the one who seeks the divorce cannot become self-supporting, then the burden of supplying the necessities of life should rest on the guilty spouse rather than upon the whole of society. But alimony should not be awarded for the purpose of deterring the divorced spouse from seeking gainful em-

19 Ill. Rev. Stat. 1947, Ch. 68, § 22.

20 DeBlaquiere v. DeBlaquiere, 3 Hag. Ecc. 322, 162 Eng. Rep. 1173 (1830) : Lewis v. Lewis, [1866] L. R. 1 P. D. 230; Magowan v. Magowan, [1921] 2 I. R. 314. Argument on behalf of the plaintiff in the instant case to the effect that, as her right to the increase would be unquestioned if she had received a decree for separate maintenance, she should not be denied the same right as it was the defendant's misconduct which had forced her to seek an absolute divorce from him, was answered, inferentially, by the adage that she had made her choice and had to be content with it. The court said that the station in life to which the defendant had accustomed plaintiff at the time of the entry of the decree was "the station in life in which he is bound to maintain her *now*." See 332 Ill. App. 586 at 598, 76 N. E. (2d) 335 at 340. Italics added.

21 Ill. Rev. Stat. 1947, Ch. 40, § 1.

22 The right of the ex-spouse to seek an increase in alimony to provide better opportunities in a more desirable environment for the child of the divorced parents is competently discussed in Foote v. Foote, 68 A. 467 (N. J. Eq., 1908), not officially reported.

23 See Armstrong, "Alimony as Abetting Divorce," 12 Va. L. Reg. (N. S.) 611 (1927).

24 In Wern v. Wern, 171 Mich. 82, 137 N. W. 71 (1912), the court took into consideration the fact that the wife was continuously sick and unable to work as the result of her husband's abuse. See also Rood v. Rood, 280 Minn. 33, 273 N. W. 337 (1937), where the ex-wife's tubercular condition necessitated her removal to Arizona.

ployment and becoming responsible for his or her own support.[25] Faced in that light, increases in alimony should be granted on precisely the same ground as an original allowance, that is where the need is demonstrable. They certainly ought not be made to turn on subsequent increases in good fortune arising independently of the help or encouragement of the ex-spouse.

MISS C. L. SAMUELSON

LANDLORD AND TENANT—TERMS FOR YEARS—WHETHER DEMAND OR SERVICE OF NOTICE ON TENANT FOR TERMINATION OF TENANCY MUST BE MADE PURSUANT TO PARTICULAR METHODS PRESCRIBED BY STATUTE—The decision announced in the recent case of *Ziff* v. *Sandra Frocks, Inc.*,[1] lends further weight to the idea that statutory methods for the service of notice to terminate a tenancy for non-payment of rent are not necessarily exclusive. The plaintiff therein sent a statutory five-day notice to the defendant-tenant by registered mail informing it of the imminent termination of the lease because of non-payment of the rent. Defendant did not pay so, after due delay, the landlord began proceedings for possession. Although admitting receipt of the notice, defendant interposed the defense that plaintiff's action lacked foundation because service of notice by registered mail did not amount to compliance with statutory requirements.[2] The trial court granted plaintiff's motion for summary judgment,[3] and on appeal that judgment was affirmed. The operation of the decision is limited, however, by the fact that the defendant admitted receipt of the notice for a different result may well have been attained had there been a factual, rather than a legal, dispute over the question of service.[4]

Technical common law requirements with respect to making a demand for rent have, fortunately, been changed by statute. Insistence thereon can no longer be used as a defense to hinder or delay the modern and

25 There is evidence of such a public policy, at least as to periodic alimony, in the provisions of Ill. Rev. Stat. 1947, Ch. 40, § 19, which puts an end to the obligation to pay if the recipient thereof should remarry. See also Banck v. Banck, 322 Ill. App. 369, 54 N. E. (2d) 577 (1944), noted in 22 CHICAGO-KENT LAW REVIEW 276, and Kahl v. Kahl, 330 Ill. App. 284, 71 N. E. (2d) 358 (1947).

1 331 Ill. App. 353, 73 N. E. (2d) 327 (1947).

2 Ill. Rev. Stat. 1947, Ch. 80, § 10, provides: "Any demand may be made or notice served by delivering a written or printed . . . copy thereof to the tenant, or by leaving the same with some person above the age of ten years . . . and in case no one is in the actual possession . . .then by posting the same on the premises."

3 Ibid., Ch. 110, §§ 181, 259.15, and 259.16, permit the use of such motion in suits for possession of land. It may not be used where complicated disputed issues of title are concerned: Ward v. Sampson, 391 Ill. 585, 63 N. E. (2d) 751 (1945).

4 In that respect, see Barbee v. Evans, 220 Ill. App. 154 (1920).

speedy summary proceeding for possession.[5] But statutory specifications vary, so the reports indicate that the modern demand may have to range from strictest compliance with statutory requirements for personal service to the merest satisfaction of the need for communication of the pertinent information. In general, however, these statutes designate similar methods of service to those found in Illinois, to-wit: personal service, substituted personal service on some proper person, or constructive service by posting on the premises.

Where the enumeration of methods is prefixed by words such as "demand shall be made," or "shall be served," or where service of notice has been raised to the dignity of a summons, the provisions have been said to be mandatory and, therefore, have excluded other possible methods.[6] Under such circumstances, the imparting of actual knowledge but by different means will not suffice for it is the proof that the notice was conveyed to the tenant by the prescribed method which governs.[7] In fact, it has been said that to hold otherwise would nullify the intent of the legislature, as there would be no need to detail specific methods if any would do.[8] Pursuant to this view, sending notice by registered mail is obviously insufficient.[9] Other illustrations of the severity of statutes of this character may be observed, as where personal service of a true copy was held ineffective because the statute required a "duplicate" copy,[10] or where substituted personal service on a member of the family was treated as being insufficient.[11] Entry of appearance by the defendant does not cure defects of an unauthorized service,[12] so other suits have been defeated where the notice was signed by improper parties[13] or where proof of agency was lacking.[14] It is the letter, rather than the spirit, of the law which is important in such situations.

5 Hotel Concord v. Callaghan, 161 Misc. 764, 293 N. Y. S. 391 (1936).

6 Small v. DeBruyn, 187 Misc. 1045, 65 N. Y. S. (2d) 591 (1946); People ex rel. Morgan v. Keteltas, 12 Hun. 67 (New York, 1877).

7 Hyde v. Goldsby, 25 Mo. App. 29 (1887).

8 Carstenson v. Hansen, 107 Utah 234, 152 P. (2d) 954 (1944).

9 213 W. Thirty-fifth Street v. Ruff, 152 Misc. 267, 273 N. Y. S. 233 (1934); Hinkhouse v. Wacker, 112 Wash. 253, 191 P. 881 (1920). In Barbee v. Evans, 220 Ill. App. 154 (1920), the court emphasized the fact that the statute required "delivery" of the notice to the tenant, but based its decision on the ground that there was no proof that the envelope in which the notice was mailed was received and opened within the time fixed by statute.

10 Lorch v. Page, 97 Conn. 66, 115 A. 681, 24 A. L. R. 1204 (1921).

11 Doran v. Gillespie, 54 Ill. 366 (1870).

12 Tierney v. Tierney, 4 N. J. Misc. 241, 132 A. 486 (1926). But see contra: D'Agostino v. Bernabel, 269 App. Div. 853, 56 N. Y. S. (2d) 35 (1945).

13 Northern Trust Co., Trustee v. Watson, 310 Ill. App. 263, 33 N. E. (2d) 897 (1941), abst. opin.

14 Mesaba Construction Co. v. 46th St. Service Station, 68 N. Y. S. (2d) 751 (1947).

Other statutes exist, however, where the permissive word "may" rather than the mandatory word "shall" is used or where no suggested methods of service are mentioned. Under such statutes, it is the fact of communication of notice which is important to accomplish the statutory object so any successful means to gain that end will be deemed sufficient.[15] Under this theory, service by registered mail is clearly effective upon a showing that notice was received even though it was not an expressly authorized manner of service.[16] In fact, one case has said that it furnishes a more desirable method than substituted service which, at best, provides only constructive notice.[17]

Under statutes of this character, the principal dispute has been as to just how far a court may go in presuming that notice has been received. A requirement for written notice presupposes there will be a delivery of that notice even though the element of delivery is not spelled out, hence merely reading the notice is not enough.[18] Absent a requirement for written demand, however, verbal notice has been held sufficient.[19] The giving of notice to one of two tenants in common is regarded as notice to both,[20] but if given by only one of the joint lessors the notice is ineffective.[21] When addressed to a corporate tenant, service on an officer or one apparently in charge of the premises has been treated as tantamount to personal service because of a duty to forward.[22]

Most statutes provide for some form of substituted personal service, as by leaving the notice with a person over a designated age or by posting, in the event personal service cannot be had. If the recipient is the wife,[23]

15 In re Bergin, 55 F. Supp. 32 (1944); Lynch v. Bernstein, 48 A. (2d) 467 (Mun. Ct., D. C., 1946); North v. Kinney, 231 Iowa 951, 2 N. W. (2d) 407 (1942).

16 Semble, Speer v. Lancaster-Johnson Lumber Co., 214 Ala. 688, 108 So. 746 (1925); Candler v. Mitchell, 119 Mich. 464, 78 N. W. 551 (1899); Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454 (1900). The headnote to an abstract opinion in Goroway v. Sheley, 331 Ill. App. 181, 72 N. E. (2d) 632 (1947), would seem to support this view.

17 Craig v. Heil, 47 A. (2d) 871 (Mun. Ct., D. C., 1946).

18 Seem v. McLees, 24 Ill. 193 (1860); Jenkins v. Jenkins, 63 Ind. 415, 30 Am. Rep. 229 (1878). The tender of notice is not a delivery thereof according to Snyder v. Abel, 235 Iowa 724, 17 N. W. (2d) 401 (1945).

19 Gash v. Dairymen's League Cooperative Assn., 10 N. J. Misc. 1228, 163 A. 147 (1932); Poindexter v. Call, 182 N. C. 366, 109 S. E. 26 (1921). Oral notice may likewise be sufficient if a provision in the lease requiring written notice may be said to have been waived: Citizens' Bank Bldg. v. Wertheimer, 126 Ark. 38, 189 S. W. 361 (1916).

20 Grundy v. Martin, 143 Mass. 279, 9 N. E. 647 (1887); Glenn v. Thompson, 75 Pa. 389 (1874).

21 McNally v. Leach, 205 S. W. 82 (Mo. App., 1918).

22 Foreman v. Hilton Co., 280 F. 608 (1922); Garage Co. v. Grand Blvd. Rink, 153 Ill. App. 45 (1910); State (Facts Pub. Co., prosecutor) v. Felton, 52 N. J. Law 161, 19 A. 123 (1889).

23 Hardebeck v. Hamilton, 268 F. 703 (1920); Bell v. Bruhn, 30 Ill. App. 300 (1889); Shaw v. Edwards, 198 Okla. 79, 175 P. (2d) 315 (1946).

father,[24] son,[25] or sister[26] and the tenant admits receipt, he cannot be heard to complain. But service has been treated as defective when the notice was not received by the tenant from the wife,[27] or from a handyman around the premises but not residing therein,[28] on whom service was had. The place of service is likewise generally unimportant for a tenant cannot complain because the notice was given on premises other than those demised,[29] but where given at the business premises which were the subject of the demise, service has been declared insufficient under a statute which fixed service at the usual place of abode.[30] Advertising the demised premises for rent does not satisfy,[31] but putting the notice through a window in the tenant's home, not on the leased premises, was sufficient when coupled with subsequent oral notification.[32] Posting notice where no one was in actual possession at the time was treated as sufficient even though it referred merely to the "premises now occupied by you."[33] It may be said, therefore, that courts will usually endeavor to seek for some indication that knowledge of the notice has been conveyed rather than act to defeat possessory actions because technical details have not been met.

On the specific point of mailing notice by registered mail, it should be remembered that the reports are full of cases concerning a presumption of receipt from the fact of stamping and mailing a letter. Like practically every other presumption, however, this one is also rebuttable[34] and may give rise to a disputed fact to be determined by the jury.[35] No such dispute was possible in the instant case as defendant admitted receipt of the registered letter, but even absent that acknowledgment it has been held that service on the wife of the tenant supports a belief that the husband received the notice,[36] so it is likely that proof of delivery of registered mail to such a person may suffice. The fact of service should,

24 Farnam v. Hohman, 90 Ill. 312 (1878).

25 Welch v. Keeran, 233 Iowa 499, 7 N. W. (2d) 809 (1943).

26 McSloy v. Ryan, 27 Mich. 110 (1873).

27 Snyder v. Abel, 235 Iowa 724, 17 N. W. (2d) 401 (1945).

28 Sankstone v. Moody, 136 Ill. App. 619 (1907).

29 Epstein v. Greer, 78 Ind. 348 (1881); Brunet v. Schulman, 177 So. 847 (La. App., 1938); Wilson v. Barnes, 134 Wash. 108, 234 P. 1029 (1925); Kincaid v. Patterson, — W. Va. —, 39 S. E. (2d) 920 (1946).

30 Hudson v. Birmingham Water Works Co., 238 Ala. 38, 189 So. 72 (1939).

31 Tuemler v. Latter & Blum, 188 So. 172 (La. App., 1939).

32 Hodgins v. Price, 137 Mass. 13 (1884). The fact of service was left to the jury, in Currier v. Grebe, 142 Pa. 48, 21 A. 755 (1891), because the tenant denied knowledge thereof.

33 Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. 788 (1890).

34 Barbee v. Evans, 220 Ill. App. 154 (1920).

35 Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. Ed. 332 (1890).

36 Steese v. Johnson, 168 Mass. 17, 46 N. E. 431 (1897).

of course, be proved by legitimate testimony consonant with the rules of evidence.[37] Admission of the original notice into evidence affords no support[38] for the burden is on the plaintiff to prove both that there was adequate notice and that it was properly served.[39] But the Illinois statute accepts the sworn return of the person serving the notice as at least sufficient to provide prima facie evidence of facts therein stated[40] so, in the absence of contradiction, such a return showing service by registered mail should hereafter be enough.

While it may be safer to follow statutory suggestions, convenience will sometimes dictate the use of other methods for giving notice of termination of tenancy. Definite proof of the receipt thereof will insure a successful action, but except for those jurisdictions where statutory provisions possess mandatory effect, the use of other reasonable means should suffice particularly where communication of the notice is not denied.

L. C. TRAEGER

MARRIAGE—OPERATION AND EFFECT OF ANNULMENT—WHETHER OR NOT ANNULMENT OF VOIDABLE MARRIAGE SERVES TO AUTHORIZE SUIT FOR TORTS COMMITTED BY ONE SPOUSE ON THE OTHER DURING COVERTURE—The question of whether a former wife may bring an action against her former husband, after the marriage has been annulled for reason of his fraud, for a tort committed by him upon her during coverture was raised, for the first time, by the recent Massachusetts case of *Callow* v *.Thomas.*[1] The parties in the case had been married in August, 1944. In November of that year, the wife was injured in an automobile accident, caused by the gross negligence of the husband, while she was riding as a passenger in his car. On the petition of the wife, the marriage was subsequently annulled because of the husband's fraudulent representations, made at the time the marriage had been entered into, concerning the state of his health. Shortly thereafter, the former wife began the instant action to recover damages for the injuries sustained by her in the automobile accident, contending that, as the decree of nullity had effaced the marriage ab initio, her cause of action was maintainable against her former spouse. Despite the ingenuity behind this argument, the Supreme Judicial Court

37 Vennum v. Vennum, 56 Ill. 430 (1870); Ball v. Peck, 43 Ill. 482 (1867).

38 Lehman v. Whittington, 8 Ill. App. 374 (1880).

39 Tolman v. Heading, 11 App. Div. 264, 42 N. Y. S. 217 (1896). Failure to receive a mailed copy of a notice which had already been served by adequate substituted service will not vitiate the latter: Davis v. Jones, 15 Wash. (2d) 572, 131 P. (2d) 430 (1942).

40 Ill. Rev. Stat. 1947, Ch. 80, § 11.

1 — Mass. —, 78 N. E. (2d) 637 (1948).

held that the plaintiff could not recover, basing its decision on the rule that, in cases of voidable marriages, things done and concluded during the period of the supposed marriage will not be undone and reopened after the decree of annulment. The opinion, however, carefully distinguished between cases of void marriages where, due to a fundamental disability, there is no marriage at the outset, and voidable marriages, which remain operative until challenged.

There is a dearth of American cases on the general subject,[2] but what decisions there are appear, in the main, to buttress the proposition that an annulment does not completely eradicate the marriage for all purposes.[3] Thus, when applying for a marriage license, a former spouse whose prior marriage has been annulled cannot claim that he has not previously been married, but must acknowledge the earlier marriage in the new license application.[4] Where the rights of third parties have intervened, growing out of the voidable marriage, a subsequent annulment thereof cannot be set up to defeat them.[5] An innocent wife who has used her spouse's funds for her support during coverture cannot be made to account for the use thereof at the time an annulment is being granted.[6] On the question of the legitimacy of issue born of an annulled marriage, however, there is a divergence of opinion. One well-known text writer states that children born under such circumstances are illegitimate,[7] and the New York case of *In re Moncrief's Will*[8] has also reached the same conclusion, but there is authority for the contrary view[9] and some states apparently settle the problem by statutes expressly designed to protect the rights of innocent children.[10]

The question of the right to alimony, whether temporary or permanent, has also been considered in conjunction with annulment proceedings. The rule has been stated that alimony is not proper in such cases[11] and quite recently a New York court refused to sanction the collection of arrearages in temporary alimony accruing under a separation order where, by subse-

2 As a general rule, torts committed during coverture are treated as being non-actionable even though divorce is subsequently obtained: Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153 (1910).

3 The court, in the instant case, lists the English decisions having any bearing on the subject. They are not discussed, but they incline in the same direction as the instant holding.

4 Factor v. Factor, 184 Misc. 861, 55 N. Y. S. (2d) 183 (1945).

5 Williams v. State, 175 Misc. 972, 25 N. Y. S. (2d) 968 (1941).

6 Huffman v. Huffman, 51 Ind. App. 330, 99 N. E. 769 (1912).

7 Bishop, Marriage and Divorce, § 690.

8 235 N. Y. 390, 139 N. E. 550, 27 A. L. R. 1117 (1923).

9 Titsworth v. Titsworth, 78 N. J. Eq. 237, 78 A. 687 (1910).

10 See, for example, Ill. Rev. Stat. 1947, Ch. 40, § 4, and Ch. 89, § 17a.

11 Annotations on the subject appear in 4 A. L. R. 926 and 110 A. L. R. 1283.

quent decree, the marriage was declared null and void.[12] Other courts, however, have held that the granting of temporary alimony is a matter calling for discretionary treatment,[13] and in one case a husband who had agreed, as part of a divorce proceeding, to pay alimony until his ex-wife remarried, was ordered to recommence payments upon the annulment of the ex-wife's subsequent marriage.[14] It is not possible, therefore, to be dogmatic on the point as to whether or not, upon annulment, the prior marital status is expunged for all purposes and to be treated as if it never existed.

Courts do recognize a right of action in tort for fraud and deceit favoring the former spouse who has been induced to enter into a marital relationship by false representations. In one such case, that of *Cohen* v. *Kahn*,[15] the court stated that, in the eyes of the law, "there never was any marriage contract between the parties. Under the circumstances I do not see how the plaintiff could be bound by the common law limitation against one spouse suing another for tort."[16] But it is not clear, from the opinion therein, whether the tort on which the action was predicated was deemed to have been committed at the time the consent to marry was obtained, or whether it continued throughout the period of coverture. If the former, that view is not at war with the reasoning upon which the instant case was decided. But if the tort was considered as one occurring during the period of the supposed marriage, it is submitted that the principle there promulgated is too broad for general adaptation.[17]

Relation back, in cases of annulment, is a fiction adopted in order to achieve justice. It should not be applied mechanically and blindly in every situation. Especially is this true with respect to voidable marriages. Such marriages will exist indefinitely unless challenged by an interested party. When so challenged, they may be obliterated as to the future but,

[12] Saunders v. Saunders, 63 N. Y. S. (2d) 880 (1946).

[13] Arndt v. Arndt, 331 Ill. App. 85, 72 N. E. (2d) 718 (1947); Hart v. Hart, 198 Ill. App. 555 (1916).

[14] Sleicher v. Sleicher, 251 N. Y. 366, 167 N. E. 501 (1929). The opinion indicated that the ex-husband was not liable for payments accruing during the existence of the marriage which was later annulled, deeming it inequitable that the wife should have two means of support at the same time, hence it would seem that recission of a marriage is not without such bounds as may be prescribed by policy and justice. See also such related problems as the right to claim a pension after annullment, illustrated by People ex rel. Byrnes v. Retirement Board, 272 Ill. App. 59 (1933), and the same issue, with regard to workmen's compensation, discussed in Southern Ry. Co. v. Baskette, 175 Tenn. 253, 133 S. W. (2d) 498 (1939).

[15] 177 Misc. 18, 28 N. Y. S. (2d) 847 (1941).

[16] 177 Misc. 20, 28 N. Y. S. (2d) 847 at 848-9.

[17] A tort committed prior to marriage is deemed discharged by the subsequent marriage of the parties before judgment has been pronounced: Gottliffe v. Edelston, [1930] 2 K. B. 378. See also note 2, ante.

as Chief Justice Cardozo observed in the case of *American Surety Company* v. *Conner*,[18] decrees of annulment cannot "obliterate the past and make events unreal."[19] It would be manifestly fanciful for courts to apply legal principles rigidly, for blind espousal of bare principle is apt to lead to bad law. The reasonableness of the approach manifested in the instant case results, therefore, in an intelligent holding.

M. J. COLANGELO

NUISANCE—PRIVATE NUISANCES—WHETHER OR NOT BUSINESS PROPRIETOR'S USE OF SIDEWALK AS WAITING PLACE FOR CUSTOMERS CONSTITUTES AN ENJOINABLE PRIVATE NUISANCE—In the recent Florida case of *Shamhart* v. *Morrison Cafeteria Company*,[1] the plaintiff, a drugstore owner, brought an action against the defendant, an incorporated cafeteria proprietor, to enjoin a nuisance and to recover damages. The facts showed that at the period of the noon and evening meals, customers of the cafeteria formed lines on the sidewalk which frequently resulted in the virtual closing of the entrance to the plaintiff's drugstore against his patrons for long periods of time. The main defenses were that the defendant did not cause the lines to form and, even if it did, it was the exclusive duty of the police to regulate the use of the public streets. Upon consideration of a master's report recommending relief as prayed, the chancellor dismissed the bill declaring there was no basis for injunctive relief. When taking jurisdiction on direct appeal, however, the Florida Supreme Court reversed the decision and ordered that relief be granted.

A business man whose premises abut upon a sidewalk or highway may make such use thereof as the needs of his business require, but there is a definite limitation upon this right, to-wit: the use must be reasonable in regard to the needs of the public or to those of other individuals such as adjoining owners.[2] This commonly approved doctrine has been applied in cases where a purely physical obstruction of the sidewalk exists[3] and there would seem to be a close analogy between the use of the sidewalk as a storeroom for one's personal property and the use thereof as a waiting room for one's customers. But in a situation where the queue constitutes the obstruction, it is not as easy to see a causal connection between the defendant and his customers. As the defendant, in this instance, does not manually place each person in the queue, for the customers form lines upon their own volition free from any direct physical control of the

[18] 251 N. Y. 1, 166 N. E. 783, 65 A. L. R. 244 (1929).
[19] 251 N. Y. 1 at 9, 166 N. E. 783 at 786.
[1] — Fla. —, 32 So. (2d) 727 (1947).
[2] Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264 (1887).
[3] Johnson Chair Co. v. Agresto, 73 Ill. App. 384 (1897).

defendant, the problem is really one of determining to what extent the defendant may be said to indirectly control the formation of the injurious queues.

Some cases dealing with this problem have found a causal connection to exist when the defendant has been guilty of an unjustifiable commission in the operation of his business.[4] The question has arisen, for example, because the defendant there concerned had maintained highly sensational window displays which attracted throngs of people to view the same. As these crowds served to obstruct the means of access to the premises of others, suits were brought to secure relief. In each instance, the court was called upon to determine whether or not the defendant was connected with the obstruction so as to make him liable for creating and maintaining a nuisance. The general holding was that if the natural and probable result of the defendant's sensational acts would be to cause a crowd to collect, he would be liable. But these decisions go no farther than to attach liability when the defendant has been guilty of unjustifiable or unnecessary positive conduct.

In the case of *Barber* v. *Penley*[5] and that of *Lyons & Sons* v. *Gulliver*[6] the foregoing method of determining causal connection was carried one step farther, so as to be made available in case of an unjustifiable omission. The defendant in each of those cases operated a theater and theatergoers queued up for an hour or so prior to the evening performance. It was declared that the queues were a nuisance which the defendants had brought about by wrongfully refusing to open their doors earlier so as to allow people to wait inside, a method which would have kept the sidewalks clear. In the first of these cases, the courts said: "As regards the defendant's suggestion that he could not help it, if in point of fact the nuisance exists which is caused by the defendant, not with an object to cause that nuisance, but by reason of the entertainment he carries on and to which he invites the public to come, it is a case in which he must either discontinue his performance, or the nuisance must be prevented."[7] If the word "business" were substituted for the word "entertainment" in the broad rule there announced, that rule would apparently cover all possible situations, and would remove the limitation that some kind of improper conduct must be shown.

4 Rex v. Carlile, 6 Car. & P. 636, 172 Eng. Rep. 1397 (1834), unusual prints and figures; Elias v. Southerland, 18 Abb. N. Cas. 1266 (New York, 1886), women combing their hair in a show window to advertise a hair restorative; Jacques v. National Exhibit Co., 15 Abb. N. Cas. 250 (New York, 1884), puppet show several times daily; Green & Green Co. v. Thresher, 235 Pa. 169, 83 A. 711 (1912), unusual display of woman's undergarments.

5 [1893] 2 Ch. 447.

6 [1914] 1 Ch. 631.

7 [1893] 2 Ch. 447 at 459.

But if there was ever any doubt that the English rule was based solely upon some form of wrongful conduct or omission, such doubt has been swept away by the case of *Dwyer* v. *Mansfield.*[8] The facts therein show that the defendant, a merchant, had a license from the Ministry of Food to sell fruit and vegetables and, since an acute potato shortage existed, he was ordered to sell but one pound of potatoes to each customer. Neighboring shopkeepers brought an action to recover for damage caused by the daily line-up. The judge, denying recovery, there declared: "Even if a nuisance had been established, that would not suffice since the plaintiffs must prove that the nuisance was due to an act which was unlawful, or the doing of something which was unnecessary or unreasonable, therefore unjustifiable. I am satisfied that it was the short supply of potatoes that caused the queues to collect and the short supply was not a matter for which the defendant was liable."[9] Even though the decision seems to have been forced upon the court by abnormal economic conditions, it is the law in England.

In the only other comparable case of this kind found in this country, that of *Tushbant* v. *Greenfield's, Inc.*,[10] the Supreme Court of Michigan was also confronted with a queue obstruction case wherein the defendant had been guilty of no unjustifiable positive conduct but lines extended from the defendant's cafeteria so as to block the entrance to, and view of, plaintiff's store. The court found it was necessary to draw an analogy from the physical obstruction cases and, by so doing, achieved the result that there had been an unreasonable use of the sidewalk. It evidently experienced no difficulty in establishing a connection between the defendant and its customers, so the court sustained a mandatory injunction which required the defendant to employ someone to supervise the lines in order to allow unobstructed entrance to the plaintiff's store. A dissenting justice therein, however, indicated that he could not see how it would be possible to ask the defendant to do more than to honestly seek police action, as a private person has no right to regulate other users of a public sidewalk.[11]

The Supreme Court of Florida, when deciding the case under discussion, relied strongly upon this Michigan case and also considered the theater cases aforementioned, but the court did not limit in any way the general principle that if the natural and probable result of one's business is to attract lines of customers, thereby impairing another's right of ingress and egress, injunctive relief may be had. That it arrived at a fair and

[8] [1946] 1 K. B. 437.

[9] Ibid., at p. 442.

[10] 308 Mich. 626, 14 N. W. (2d) 520 (1944).

[11] The police argument was also advanced in the cases referred to in notes 4 to 8, ante, but has never received judicial affirmation and has only served as the basis for a dissenting opinion.

just decision seems evident for it would be an alarming decision indeed that would allow another's right of access to his property to be taken away under the cover of his neighbor's business ingenuity.

Where one maintains a profitable nuisance he should not complain when asked to take reasonable steps to prevent injury arising therefrom. The expense of abating the nuisance should properly fall upon him and he should not be allowed to pass it on to the taxpayers by insisting that only the police shall have the power to regulate his waiting customers. After all, the persons comprising the nuisance are not strangers to such a defendant, but are his own patrons whom he knowingly invites to come to his premises even if that may mean a long wait upon the sidewalk. Considered in this light, it is hardly conceivable how a closer connection between a defendant and a wrong could be shown. Although the law in England may allow an innocent business man, under unusual circumstances, to drive his neighbors into bankruptcy, it is comforting to know that this practice will not be passively commended in this country.

H. J. JENNINGS

RELEASE—CONSTRUCTION AND OPERATION—WHETHER OR NOT RELEASE, GIVEN TO ONE TORT FEASOR AS TO COMMON LAW LIABILITY, OPERATES TO RELEASE ANOTHER FROM CAUSE OF ACTION GROWING OUT OF VIOLATION OF "DRAM SHOP" STATUTE—The controversial question as to whether or not the Illinois Liquor Control Act[1] creates a separate and distinct cause of action which would remain unimpaired, even though there has been a release of a common-law right of action for personal injuries growing out of the same situation, was considered in the recent case of *Manthei* v. *Heimerdinger*.[2] The appellant therein filed his complaint against a tavern operator and the owner of the building in which the tavern was located, predicated on the statute, for injuries arising out of an automobile accident occurring when the car in which he was a passenger was struck by another driven by one Kerch. He alleged that the tavern operator had caused Kerch to become intoxicated, hence claimed that the defendants were liable under the statute. Appellees defended on the ground that appellant had executed and delivered a general release to Kerch and the insurer of Kerch's car covering the accident in question. The trial court sustained appellees' contention that such general release had operated to extinguish appellant's right of action under the statute and dismissed the suit. The Appellate Court for the Second District, on appeal, affirmed that ruling, holding

1 Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq. Section 135 thereof provides for the maintenance of actions for damages caused by intoxicated persons.

2 332 Ill. App. 335, 75 N. E. (2d) 132 (1947).

that whether or not the several wrongdoers were joint tort-feasors was relatively unimportant, it being enough that all were liable for the same indivisible injury arising out of a single accident, and the familiar rule that the release of one tort-feasor serves to release the other tort-feasors had to be applied.

There being no Illinois case squarely in point, the appellant found it necessary to rely on the Minnesota case of *Philips* v. *Aretz*[3] to sustain his position. In that case, the plaintiff's father, having become intoxicated by liquor sold to him by the defendant, a dram shop keeper, was subsequently killed by an automobile. The administratrix of the deceased executed a release in favor of the operator of the car, and a portion of the proceeds of that settlement was set aside for the benefit of the minor plaintiff. In a subsequent action by the minor against the dram shop keeper to recover damages for the death so arising, the Minnesota Supreme Court held that the Wrongful Death Act[4] and the Liquor Licensing Act[5] were remedial enactments unknown to the common law, wholly unrelated in scope and purpose, and permitted separate recoveries. The court there stated, in part, "We think, and so hold that recovery here is allowed not for a tortious wrong but as a means of enforcing the penalty imposed on the dealer by statute. . . ."[6] The court in the instant case rejected the principle underlying the Minnesota decision as being inapplicable because in the suit before it the supposedly several claims were not based on different statutes but rather consisted of a claim predicated on negligence at common law as well as under the Liquor Control Act, hence really amounted to a single indivisible cause of action. That result was achieved by regarding the statutory remedy as one designed to *compensate* the injured person for the damage sustained rather than as a means of enforcing a *penalty* imposed on the liquor dealer by statute, so that, once compensation had been received, all claim under the statute was gone.[7]

Many factors militate against the decision so reached. It seems rea-

[3] 215 Minn. 325, 10 N. W. (2d) 226 (1943). See also Mayes v. Byer, 214 Minn. 54, 7 N. W. (2d) 403 (1943).

[4] Minn. Stat. 1941, § 573.02.

[5] Ibid., § 340.12(4).

[6] See syllabus 5, by the court, 215 Minn. 325, 10 N. W. (2d) 226 (1943). The court further held that defendants could not escape liability on the theory that the liquor dealer, who furnished decedent with liquor contrary to law, and another who drove his car so as fatally to injure decedent were joint or concurrent tort-feasors.

[7] It is clear that a release given to one tort-feasor will absolve others involved in the same wrong and subject to the same form of action, Mooney v. City of Chicago, 239 Ill. 414, 88 N. E. 194 (1909), on the assumption that the money paid was received as "full compensation" for the injury sustained and any attempt in the release to reserve a claim against the others would be void as there would then be nothing to reserve: 45 Am. Jur., Release, § 39.

sonably apparent from the original title of the act[8] and its present broad scope that the primary purpose thereof was to control the traffic in alcoholic beverages. The legislation was enacted pursuant to the police power of the state, and created a separate and distinct right of action not previously known.[9] The benefit thus conferred on those injured by the conduct of intoxicated persons was clearly an incident to the general scheme for such injured persons already had a right of action against the primary wrongdoer at common law, and to provide an additional right of action could serve no rational purpose unless it would be to punish the liquor dealer for his statutory breach. Actions brought under the remedial provisions of the act are not predicated on negligence, but upon the violation of the statutory duty.[10] The two-year statute of limitations does not apply, as it would to actions for personal injuries sounding in tort,[11] nor does the monetary limitation imposed on actions for wrongful death[12] affect the amount of the possible recovery under this statute.[13] Contributory negligence, generally, is not a defense,[14] although where the injuries complained of were sustained by the intoxicated person, the reverse may be true.[15] Clearly, then, the right of action under the statute is readily distinguishable from any remedy conferred by the common law.

If further emphasis of that fact is necessary, it is provided by the language of the Appellate Court for the Second District, in the case of *Hyba* v. *Horneman, Inc.*,[16] where the court declared that civil damage statutes with reference to keeping dram shops are "similar in purpose and therefore have a general similarity in their terms and provisions. Their evident object is to *punish* those who furnish means of intoxication by making them liable in damages caused thereby."[17] The court further stated, "Therefore we find the two acts [the Dram Shop Act and the Injuries Act] to be separate and distinct, and that the rights created

8 The title to the first statute, R. S. 1874, p. 438, was "An Act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors." The present statute, Ill. Rev. Stat. 1947, Ch. 43, § 94 et seq., is simply entitled "An Act relating to alcoholic liquors."

9 O'Connor v. Rathje, 368 Ill. 83, 12 N. E. (2d) 878 (1937).

10 Douglas v. Athens Market Corp., 320 Ill. App. 40, 49 N. E. (2d) 834 (1943).

11 O'Leary v. Frisbey, 17 Ill. App. 563 (1885).

12 Ill. Rev. Stat. 1947, Ch. 70, § 1.

13 O'Connor v. Rathje, 368 Ill. 83, 12 N. E. (2d) 878 (1937).

14 Thompson v. Hogan, 309 Ill. App. 413, 33 N. E. (2d) 151 (1941); Hyba v. Horneman, Inc., 302 Ill. App. 143, 23 N. E. (2d) 564 (1939); Spousta v. Berger, 231 Ill. App. 454 (1923).

15 Hill v. Alexander, 321 Ill. App. 406, 53 N. E. (2d) 307 (1944); Kopp v. Benevolent Order of Elks, 309 Ill. App. 145, 33 N. E. (2d) 161 (1941).

16 302 Ill. App. 143, 23 N. E. (2d) 564 (1939).

17 302 Ill. App. 143 at 145, 23 N. E. (2d) 564 at 566. Italics added.

thereby do not rest on the same basis. . . . The right of recovery under each appears to be separate and distinct and in no way founded upon or governed by the rights of recovery under the other. . . . This permits of but one conclusion, that they are independent actions, and hence the one can not be considered as exclusive of the other."[18] Three years later, the Appellate Court for the Third District, in the case of *Meyers* v. *Young Mens Christian Association of Quincy Illinois*,[19] also pointed out that there is "no connection between the common law right of action in tort and the specific statutory liability created under the Dram Shop Act. . . . Their purposes and remedies are different. In a proper case both causes of action may be pursued independently, and the satisfaction of one would not abate nor affect the right of action under the other."[20]

It is difficult, in the face of this language, to reconcile the reasoning in the principal case, for it not only rejects the rationale of the Hyba case, decided in the same district, and the confirmatory ruling of the Third District in the Meyers case, but does so without commenting on either.[21] Instead, it looks to the wording of a decision by the Appellate Court of Indiana pronounced twenty-eight years ago to support the result here achieved.[22] By failing to reverse its own holding or to distinguish its own language, the court leaves the law of Illinois in a state of turmoil and indecision.

It is not anomalous to find a statute designed to force an industry to bear the expense of the injuries it fosters, irrespective of the negligence or lack thereof of its individual members.[23] If such a statute displaces a common-law remedy, it is not unreasonable to expect that the injured person should be limited to the statutory substitute, hence be restricted in the amount he can recover thereunder. But when such has been the case, there is evident language in the statute to show the existence of such a limitation, a provision compelling an election between the old and the new remedy, or else some compulsory form of subrogation in favor of the one who, by the statute, is forced to pay for the injury over against the

18 302 Ill. App. 143 at 146, 23 N. E. (2d) 564 at 567.

19 316 Ill. App. 177, 44 N. E. (2d) 755 (1942).

20 316 Ill. App. 177 at 189, 44 N. E. (2d) 755 at 760.

21 A possible explanation may lie in the fact that Justice Dove wrote the opinion in the instant case and it was concurred in by Justices Wolfe and Bristow, whereas the court, at the time the Hyba case was decided, consisted of Justices Pearce, Huffman and Hill.

22 Brown v. Kemp, 71 Ind. App. 281, 124 N. E. 777 (1919). That case held that the basis of an action on a liquor dealer's bond sounded in tort, and the tort-feasor rule applied. To the same effect is American Surety Co. of New York v. Souers, 50 Ind. App. 475, 98 N. E. 829 (1912).

23 See, for example, the Workmen's Compensation Act, Ill. Rev. Stat. 1947, Ch. 48, § 138 et seq., and the Occupational Diseases Act, ibid., § 172.1 et seq.

person really at fault.[24] In such situations, the intent that the injured person may have but one recovery is obvious. By contrast, provisions of this character are absent in the Illinois Liquor Act, hence there is no foundation for any inference that the legislature designed the dram shop proceeding to be either an exclusive or a substitute remedy for the injured person. Legislative failure, in over three-quarters of a century, to act to revise or modify the statute to make that inference clear can only support the contrary inference that such was not the legislative desire. If it was not, then the courts should not attempt to make it so by wavering judicial interpretation.

C. J. PRATT

[24] Such is the case in matters of workmen's compensation: Ill. Rev. Stat. 1947, Ch. 48, § 166. See also Campbell, "Subrogation under Workmen's Compensation—Too Much or Too Little," 18 CHICAGO-KENT LAW REVIEW 225-47 (1940).